

## ***Division of Behavioral Health Services***

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**TO:** RBHA and TRBHA CEOs and Clinical Leadership

**FROM:** Jerry L. Dennis, M.D.  
ADHS/DBHS Medical Director

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**SUBJECT: POLICY CLARIFICATION: ADVANCE DIRECTIVES**

**DATE:** September 15, 2004

This memorandum is intended to clarify the responsibilities of Tribal and Regional Behavioral Health Authorities (T/RBHAs) and their subcontracted providers in meeting the Arizona Department of Health Services/Division of Behavioral Health Services (ADHS/DBHS) policy requirements regarding advance directives.

This memorandum addresses the following issues:

- T/RBHA and/or subcontracted provider responsibility in assisting persons with developing advance directives;
- The instances in which T/RBHAs and/or subcontracted providers may choose not to honor portions of advance directives; and
- The pre-petition screening process for persons with a mental health care power of attorney.

### **To what degree must T/RBHAs and/or subcontracted providers assist adult persons with developing advance directives?**

As described in ADHS/DBHS Provider Manual Section 3.12, Advance Directives, behavioral health providers must assist adult persons who are interested in developing and executing an advance directive. This requirement is based upon federal regulations that include a stipulation to "provide community education concerning issues related to advance directives." In order to fulfill this requirement and ADHS/DBHS policies, T/RBHAs and/or subcontracted providers must, at a minimum, provide written information to adult individuals receiving behavioral health services concerning an individual's right under state law to make decisions concerning behavioral health care, including the right to accept or refuse behavioral health treatment and the right to formulate, at the individual's option, advance directives (42 CFR 489 subpart I, 42 CFR 422.128). In addition to this, T/RBHAs and/or subcontracted providers may develop and utilize separate community education materials at their own discretion.

### **May T/RBHAs and/or subcontracted providers choose not to honor an advance directive?**

There are instances in which T/RBHAs and/or subcontracted providers may, out of conscience, choose not to honor portions of a person's advance directive. According to 42 CFR 489.100, however, T/RBHAs and/or subcontracted providers must provide information to adult individuals receiving behavioral health services.

The information must include “written policies of the provider or organization respecting the implementation of [advance directives], including a clear and precise statement of limitation if the provider cannot implement an advance directive on the basis of conscience.” A T/RBHA or subcontracted provider’s statement of limitation must contain the following elements, at a minimum:

- Clarify any differences between institution-wide conscience objections and those that may be raised by individual physicians;
- Identify the state legal authority permitting such objection; and
- Describe the range of behavioral health conditions or procedures affected by the conscience objection.

T/RBHAs and/or subcontracted providers must not prevent persons from creating advance directives and must honor advance directives except in the limited instances outlined in the T/RBHAs and/or subcontracted provider’s statement of limitation.

**Must T/RBHAs and/or subcontracted providers honor advance directives that refuse service from specific facilities/providers?**

If a person has an advance directive that states that he/she does not want to be treated in a certain facility or by a certain provider, T/RBHAs and/or subcontracted providers must honor that request. In the event that the facility/provider to which the person objects is the only contracted facility/provider capable of providing the needed behavioral health service, T/RBHAs are not obligated to authorize the service through a non-contracted provider except in situations that require emergency services. However, T/RBHAs are highly encouraged to provide services that are requested by the person’s clinical team. If the person’s clinical team requests services from a non-contracted provider, the Department recommends that T/RBHAs attempt to provide the requested service. This could occur through a single case agreement, or by pursuing a contract with a non-contracted provider.

**How does the pre-petition screening process work for a person who has a mental health care power of attorney?**

According to Provider Manual Section 3.12, Advance Directives, a mental health care power of attorney gives an adult person the right to designate another adult person to make behavioral health care treatment decisions on their behalf. Furthermore, a designee may consent to admitting the adult person to a Level I behavioral health facility licensed by ADHS if this authority is expressly stated in the mental health care power of attorney. Therefore, before T/RBHAs and/or subcontracted providers pursue the pre-petition screening process for Level I court ordered evaluation, the treating professional should always determine first whether the person has a mental health care power of attorney that allows the designee to voluntarily admit the person for evaluation or treatment.

It is imperative that T/RBHA staff and subcontracted providers have knowledge of and perform in accordance with ADHS/DBHS policy and federal and state law. Please ensure that the information contained in this memorandum is communicated to all relevant internal and subcontracted personnel, and that any current practice contrary this memorandum, ADHS/DBHS policy or federal or state law regarding advance directives is modified. If you have any questions regarding this policy clarification, please contact Dan Wendt at (602) 364-4660.